No. 21,652

IN THE

United States Court of Appeals

For the Ninth Circuit

PAXTON TRUCKING COMPANY, a corporation, and WILLIAM EARL BAILEY,
Appellants,

vs.

THE CUDAHY PACKING COMPANY,
Appellee.

On Appeal from the United States District Court for the District of Nevada

BRIEF OF APPELLEE

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INDEX

Table of Citations

Cases

Rules

Statutes

Texts

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PRELIMINARY STATEMENT

The Opening Brief of Appellants was received by counsel for Appellee on July 7, 1967. This Brief is in answer thereto. For the purpose of brevity and to conform with the descriptive terminology employed in the Appellants' Opening Brief, the Appellant William Earl Bailey will be hereinafter called "Bailey", the 1960 Peterbilt tractor will be designated as the "Peterbilt tractor", the trailer belonging to the Appellant Paxton Trucking Company will be hereinafter called the "Paxton

trailer", the Kenworth tractor and trailer belonging to the Cudahy Packing Company will be hereinafter called the "Cudahy truck", and the Pacific Motor Transport truck driven by Wayne Morrow will be hereinafter called the "P.M.T. truck".

The following additional testimony is set forth in addition to and in controvention to the statement of the case appearing in Appellants' Brief.

ADDITIONAL STATEMENT OF THE CASE

Additional Circumstances in Relation to the Conduct of Bailey

Bailey depended on Morrow and the P.M.T. truck to signal on-coming traffic (T. 141:18-20). He admitted that it was a mistake (T. 141:15-17); that he didn't put out flares (T. 104:7-13) (T. 141:21-23); that he couldn't remember signalling with his flashlight (T. 142:1-3).

Bailey was out of the cab two or three times trying to start the motor manually (T. 151:13-19). Bailey had to get out of the cab to go to the starter and solenoid (T. 151:5-9) and when he was out of the cab he couldn't blink his lights (T. 151:10-12). The tractor started immediately after the impact (T. 152:9-13) when he pulled the wrecked trailer off the highway (T. 153:1-5) and operated

satisfactorily for some period of time after (T. 153:6-8).

Bailey was coasting along when his motor started running wild and he shut the motor off. He then looked for a place to turn off to the right (north of highway) and saw what he believed to be a space south of the highway and decided to pull over there (T. 116:18-25) (T. 117:1-8).

The lights were turned out by Bailey on his truck and trailer while he tried to start the engine. Bailey testified that he probably did turn them off after he heard the Cudahy truck (T. 119:1-3). Morrow testified that Bailey's lights were off for at least one-half minute when the Cudahy truck was more than a quarter of a mile up the road (T. 100:13-19) (T. 105:18-20) (T. 110:7-19). Dodd testified that he did not see any lights on the Paxton trailer and Peterbilt tractor (T. 44:22-25).

The Cudahy relief driver, Lynn G. Larsen, was present when Bailey , immediately after the collision, stated that he was sorry; that he was having truck trouble and that he was under his truck when he heard the Cudahy truck coming and he jumped out and watched the collision (T. 70:2-9).

Additional Circumstances in Relation to the Conduct of Dodd

Dodd saw the trailer when he was immediately

in front of it (T. 42:5-13), at least 113 feet away. The P.M.T. truck appeared to be in the west-bound lane, even with the Paxton trailer (T. 43: 6-10). Dodd immediately applied the air brakes (T. 43: 14-16). He did not see lights on the trailer but only the reflector (T. 45:1-3). It did not appear that there was room to pass between the rear end of the Paxton trailer and the P.M.T. truck (T. 46:8-17). The P.M.T. truck blinked its lights at him about the same time as he saw the trailer (T. 56:11-13) about 200 feet away. The speed of the Cudahy truck was fifty-seven (57) miles per hour (Ptf. Ex. 1) and the brakes and lights were in good condition, having been checked by mechanics before each run in Salt Lake City, Utah (T. 47:3-7) and road-checked by Dodd and his driving partner, Lynn G. Larsen, every fifty (50) miles (T. 47:14-17).

Additional Circumstances Surrounding the Collision

Morrow testified "that the Paxton trailers when they are broadside are hard to see, having three possibly four lights on them in a straight row . . . that there are several motels . . . with red lights and green lights and it would be easy to confuse it with the lights that were shining from motels (T. 103:18-25).

The Paxton trailer had two tail lights, but Bailey

could not testify that they were visible to the side (T. 147:23-25). In fact, he was not too familiar with the trailer as he had just picked it up in Salt Lake City the day prior to the accident (T. 121: 15-22) (T. 147:20-22).

Morrow testified that the area to the north of the highway . . . "awfully sandy. But it is flat there. There is no ditches or anything, and the barrow pit doesn't amount to anything". (T. 108: 4-6). Morrow further testified that he could have moved his P.M.T. truck out to the right (north) of the highway with no problem at all. (T. 108: 7-9).

Dodd testified that Morrow had made an accusatory statement in Bailey's presence, which was not denied by Bailey, that Bailey had turned out his lights (T. 49:22-25) (T. 50:1-7).

Dodd's relief driver, Lynn G. Larsen, who at the time of the collision was asleep in the sleeper portion of the cab of the Cudahy truck (T. 67: 20-22), after ascertaining that Dodd was not badly hurt, put flares on in front of the Cudahy truck and about fifty (50) feet to the rear. There had been no flares placed anywhere for warning prior to this time (T. 67:23-25) (T. 68:1-15). Morrow also put out flares (T. 96:10-11).

Larsen further testified that when he placed

the flares, after the collision, that that there were no lights on the Peterbilt tractor or the Paxton trailer (T. 68:23-25) (T. 69:1-2) (T. 73:5-21).

ARGUMENT

I. WHETHER THE COURT'S FINDING THAT APPELLANTS WERE NEGLIGENT WAS CLEARLY ERRONEOUS.

Appellants seek to apply the doctrine of "sudden emergency" to the situation here. They cite as authority Restatement, Second, Torts, Section 296(1). Reference is made to Comments A and C immediately following the above-quoted section.

Comment A . . . ."This section is applicable where the sudden emergency is created in any way other than by the actor's own tortuous conduct or where it is created by the unexpected operation of a natural force or by the innocent or wrongful act of a third person".

Comment C . . . ."In determining whether the actor is to be excused for an error of judgment in a sudden emergency, importance is to be attached to the fact that many activities require that those engaged in them shall have a special aptitude or such training as to give them the ability to cope with those dangerous situations which are likely to arise

in the course of such activities." Following thereafter was an example of a dri ver of a high-speed inter-urban omnibus.

Bailey had been a diesel truck driver for five years; in fact, his entire experience had been with the Peterbilt tractor, the one involved in this collision (T. 114:1-5). A higher degree of aptitude would be required of him than of the ordinary individual in the event of engine or throttle failure. The case of Vascacillas vs. Southern Pacific Company, 247 Fed. 8 (C.A.9) involves an entirely different set of circumstances. There the plaintiff had pulled onto a railroad crossing and, as he entered into the crossing area, the train gates came down as the train approached the crossing. The alternative courses of action to the plaintiff were whether to turn his team and wagon around and avoid the train from the direction in which he had come, or to proceed and clear the crossing. He chose to proceed. The collision with the train occurred, and the plaintiff was injured. In the Vascacillas case we have the emergency created by the action of a third person, i.e. the train. In the instant case the emergency is created by the truck driven by Bailey.

Further, Appellants would base the negligence, if any, of Bailey in selecting the area across the highway for parking his truck rather than the area to the north of the highway.

There was more than the choice of location involved here. Bailey, in addition, turned off his motor while the truck was in motion, relying on his ability to coast to the stopping place chosen by him. After stopping he failed to place flares warning east-bound and west-bound traffic. He turned off his lights endeavoring to start the vehicle.

Finally, the trial court has determined that the conduct of Bailey was negligent. The scope of review mentioned by the Appellants is specifically set forth in Rule 52 A of the Federal Rules of Civil Procedure . . . "Findings of Fact shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses". Reference is made to Title 28, U.S. Code Annotated, Rule 52, Note 37, and the numerous cases cited thereunder. It is urged that there is substantial evidence to support the decision of the District Court that Bailey was negligent, and that there is no substantial evidence existing against such a finding.

II. WHETHER ANY CONDUCT OF BAILEY WAS THE PROXIMATE CAUSE OF THE COLLISION

The Nevada Supreme Court in MAHAN v. HAFEN, 351 P. 2d. 617 (1960), restates the definition of proximate cause as "proximate cause is any cause being in natural and in continuous sequence unbroken

by any intervening cause, produces the injury complained of and without which the result would not have occurred". Appellants again argue that there was only one proximate cause of injury consisting of only one factor, one act and one element of circumstance, i.e. the choice of location by Bailey. We have stated before that the negligence of Bailey consisted, in addition to this factor, in his shutting off his engine before his truck had reached a place of safety, in his failure also to put out flares and his turning off his lights in endeavoring to start his vehicle. Without these series of acts of negligence on the part of Bailey, the collision with the Cudahy truck would not have occurred.

Dodd testified that he saw no signal until he was within 200 feet of the collision. There is a conflict of testimony in this regard, and the lower Court has resolved it in favor of the Appellee. This must be accepted as true; that Dodd acted immediately in regard to this warning is testified to by him (T.57:5-8) and the fact that he immediately put on his brakes as borne out by the skid marks starting within 113 feet from the point of impact (T. 20:16-18). Appellants urge that Dodd was contributorily negligent and that such contributory negligence was an intervening cause so that Bailey's negligence was no longer the proximate cause. The answer to this is simply that the lower Court has held that Dodd was not negligent and, certainly then, the acts of the Appellant Bailey were directly respons-

ible for the damages suffered by the Appellee.

Reference is made to the Nevada case of Alex Novack & Sons vs. Hoppin, 359 P. 2d. 390 (1961), where the circumstances involved were similar to those we have in the instant case. There the defendant Johnson parked his truck on the shoulder of the road protruding into the lane of traffic and failed to put out flares and turned off his lights, although he did place reflector-type flares to the rear of the parked equipment. Drivers of other vehicles travelling in the same direction as Johnson testified that due to the fact of faulty lighting on equipment driven by Johnson they had not seen such equipment until in its immediate proximity, when each of such drivers overtaking Johnson had successfully taken last-minute emergency action to avoid the collision. The deceased failed to take this emergency action and the collision occurred. The Supreme Court upheld the judgment of the lower Court against Johnson and the owner of the parked equipment, Alex Novack & Sons.

A further discussion of the matter of contributory negligence appears below.

III. WHETHER THE COURT'S FINDING THAT JOHN WALTER DODD WAS FREE FROM CONTRIBUTORY NEGLIGENCE WAS CLEARLY ERRONEOUS

A. Consideration of the cause under the doctrine of negligence per se.

Appellants have argued that Dodd was negligent as a matter of law for travelling down the highway with lights at what is commonly known as "low-beam". Appellants' witness, Wayne Morrow, testified to this and that this was done in response to his flicker of his lights. N.R.S. 484.410, Subsection 1, also requires that a driver of a vehicle approaching an on-coming vehicle within 500 feet shall use a distribution of light so aimed that the glowing rays are not projected into the eyes of the on-coming driver. This is defined in N.R.S. 484.400, Subsection 2, as of an intensity to reveal persons or vehicles at a distance of, at least, 100 feet ahead. The P.M.T. truck with its lights on was parked in the vicinity of the Paxton trailer. Morrow testified somewhere in the neighborhood of 150 feet to the east. Dodd testified that it appeared in the lane of traffic, and he could not tell whether it was standing or proceeding west. Dodd performed the act that was required of him by statute, and that was when he observed the P.M.T. lights he dimmed his own lights to "low-beam".

If Appellants argue that Dodd dimmed his lights prematurely, this is based solely on the testimony of Morrow. Certainly, when he was more than 350 feet from the Paxton trailer, he was no longer in violation of the statute. Assuming that the lights of the Cudahy truck complied with the provisions of N.R.S. 484.400, Subsection 1, the "high-beam" would be of such intensity as to reveal

persons and vehicles at a distance of, at least, 350 feet. This contention of Appellants is simply without merit, as the violation of the ordinance did not exist; there is no negligence per se.

On the other hand, there is no question of Bailey's violation of N.R.S. 484.290 and N.R.S. 484.370 which requires that trucks parked on a highway, or adjacent thereto, display lights visible for a distance of 500 feet.

B. Consideration under the doctrine of range and vision.

We admit that Nevada has adopted the so-called "Range of Vision Rule", as announced in the cases cited in Appellants' Brief. However, in reading the cases, it is apparent that Nevada does not accept the strict doctrine that a violation of this rule constitutes negligence or that of contributory negligence as a matter of law. A reading of these cases will reveal that Nevada, on the other hand, follows the more recent, and we believe better, reasoning that the rule serves as a guiding factor in determining whether the motorist exercises due care as to speed and control in light of all circumstances. It will be noted in each of the Nevada cases that there was an instruction submitted to the jury, which was considered along with all other instructions, to determine either the matter of negligence or contributory negligence. This matter is treated

in Blashfield Automobile Law and Practice, Third Edition, Volume 2, Section 105.37.

We are particularly impressed with the statements contained in Morehouse v. City of Everett, 252 P. 157, 160, 161; 141 Wash. 399; 58 A.L.R. 1482:

"To hold that one is, as a matter of law, guilty of contributory negligence in not, under all circumstances, seeing whatever his lights may disclose, would be to practically nullify the statutes which require red lights to be carried upon automobiles and to be placed upon obstructions in the streets or roads; or, at least, to encourage travelers on the roads, or those placing obstructions therein, not to comply with the law in those respects, for, under the rule contended for, a disobedience of the law with regard to red lights would not entail any evil consequences." Also in the North Carolina case of U.S. v. First-Citizens Bank & Trust Co., C.A.N.C., 208 F. 2d. 280

"The 'outrunning headlights rule' under North Carolina law that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within distance that objects can be seen ahead of it does not preclude examination of alleged negligence of driver under rule of reasonable prudence or provide a bomb-proof haven of refuge for

one who has left an unlighted death trap on a public highway in the darkness of the night." (Underscoring ours).

Dodd, in the operation of the Cudahy truck, was proceeding at approximately the speed limit. He had dimmed his lights in the face of the lights of the P.M.T. truck. According to the testimony of Morrow, the Paxton trailer was unlighted for, at least, one-half minute during this period of time. According to Dodd's own testimony, it was unlighted during the entire period. Proceeding at the rate of speed of 57 miles per hour, the Cudahy truck would have covered the distance (one mile) from the top of the hill to the scene of the collision in little over one minute. That upon observing the Paxton trailer Dodd immediately applied his brakes. In this regard we must recognize reaction time and the beginning of the skid marks 113 feet from the point of impact; that there was insufficient time for Dodd to do anything other than apply his brakes. These facts were taken into consideration by the District Judge, who found the Cudahy driver Dodd to be free of contributory negligence. This part of Appellants' argument should also be resolved in favor of the Appellee.

The statement at the end of Appellants' Brief in relation to the remarks of the District Court should be read in its entirety beginning with line 19, page 158, of the Transcript, through line 7

of page 159, the intent being to compliment the attorney for the Appellants, and, perhaps, to soften the effect of an adverse judgment in favor of the Appellee.

CONCLUSION

The Court is urged that the judgment of the District Court be affirmed.

Dated, Winnemucca, Nevada
July 19, 1967

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF COUNSEL

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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